

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOROTHY NISPEL)	
Claimant)	
VS.)	
THOMASBROOK APARTMENTS)	Docket Nos. 143,397; 143,398
Respondent)	& 143,399
AND)	
)	
THE HOYT GROUP, LTD.)	
Respondent)	
AND)	
)	
THE HARTFORD INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent and its insurance carrier appeal from an Order of Dismissal entered by Administrative Law Judge Robert H. Foerschler on September 17, 1996. The Appeals Board heard oral argument on March 18, 1997 in Kansas City, Kansas.

APPEARANCES

Claimant, having settled its claims against respondent, appeared not. Respondent and its insurance carrier appeared by their attorney Christopher T. Wilson of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Gary L. Jordan, Ottawa, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the documents, pleadings, and correspondence contained in the administrative files for these docketed claims including the transcript of the June 24, 1992 Settlement Hearing; the July 28, 1992 Regular Hearing; the August 25, 1992 deposition of Dorothy Nispel; the October 2, 1992 deposition of William O. Reed, Jr., M.D.; and the July 23, 1996 Transcript of Proceedings.

The issues as between claimant and respondent were settled on June 24, 1992. However, the Workers Compensation (Fund) did not stipulate to the reasonableness of the settlement and all issues as between respondent and Fund were reserved. Thereafter on July 10, 1996, the respondent and Fund filed the following written Stipulations in Docket No. 143,399.

- "1. The alleged accident occurred in Johnson County, Kansas;
2. The alleged accident occurred on or about February 14, 1990;
3. The relationship of employer and employee existed on the alleged date of accident;
4. The parties are covered by the Kansas Workers' Compensation Act;
5. That the claim was timely made;
6. The insurance carrier on the alleged date of accident was Hartford Insurance Company;
7. The claimant's average weekly wage was \$200.00;
8. Temporary total disability benefits paid to claimant for Docket Numbers 143, 397, 143,398 and this case totalled \$10,324.17 (77.43 weeks at \$133.34 per week);
9. Medical benefits paid to claimant for Docket numbers 143,397, 143,398 and this case totalled \$52,244.07;
10. Claimant was paid a lump sum settlement of \$13,101.45 for Docket Numbers 143,397, 143,398 and this case.
11. Claimant is not claiming any reimbursement for medical or hospital expense incurred;
12. Claimant alleged an injury to the body as a whole;

13. There are no unpaid medical and hospital expenses;
14. There are no additional dates of temporary total disability;
15. The Workers' Compensation Fund has been implied as a party to this case;"

ISSUES

The issues for determination by the Appeals Board concern the applicability of K.S.A. 1996 Supp. 44-566a(c)(3), specifically: (1) whether the new statutory enactment of K.S.A. 44-566a(c)(3) can be applied retroactively; (2) whether the liability of the Fund was established within five years of the date of the employee filing a written notice of claim; and (3) whether respondent has shown just cause for this case to be left open.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of counsel for the parties, the Appeals Board finds that the Order of Dismissal entered by the Administrative Law Judge should be reversed.

The Appeals Board agrees with the Administrative Law Judge's findings of fact and conclusions of law enumerated in said Order except that in applying said statute the Appeals Board finds respondent has met its burden of showing just cause for its claim against the Fund to be left open. The Appeals Board specifically agrees with the Administrative Law Judge's finding that although its intent is not expressly stated therein, the legislature could not have intended other than for the provisions of K.S.A. 1996 Supp. 44-566a(c)(3) to be applied retroactively.

For the purpose of determining whether the Fund's liability was established within five years of the date the employee filed written notice of claim, the Appeals Board finds the date "written notice of claim" was "filed" means the date an application for hearing was filed with the director as contemplated by K.S.A. 44-534. In these three docketed claims, claimant's applications for hearing were filed with the director on February 26, 1990. As of July 23, 1996, when the Fund filed its motion to dismiss pursuant to K.S.A. 1996 Supp. 44-566a (c)(3), this case had not been submitted to the Administrative Law Judge for decision. The regular hearing had been started, stipulations had been taken and the issues had been established. However, terminal dates for the presentation of evidence had not been set and the Fund had not presented its evidence. See K.S.A. 44- 523; K.A.R. 51-3-1; K.A.R. 51-3-5; and K.A.R. 51-3-8. The Appeals Board finds that the liability of the Fund was not established within five years of the date the employee filed a written notice of claim.

The Appeals Board agrees with the Fund's contention that respondent had ample time to finalize and submit its case against the Fund between the time of the settlement of these cases with the claimant on June 24, 1992 and the April 4, 1996 effective date of the statutory amendment. Nevertheless, because the amendments to K.S.A. 44-566a constitute a new procedural requirement for expediting claims against the Fund, some leniency should be given to respondent's initially to permit them an opportunity to pursue those cases which have been gathering dust. Previously, there had been no provisions for the dismissal of such claims for failure to prosecute. Furthermore, had the Fund wanted to expedite these cases and close their files, the Fund has always been able to set them for regular hearing and ask for terminal dates to be established for the completion of the evidentiary record. Here the Fund waited until respondent's case was essentially completed before filing its motion to dismiss under K.S.A. 1996 Supp. 44-566a(c)(3).

A reasonable period of time will be permitted after the April 4, 1996 effective date of the amendments to the statute for the parties to complete their records and submit the cases for decision. In determining whether there has been a showing by one of the parties that the case should be left open, the trier of fact may look to what action has taken place on the case between the April 4, 1996 effective date of the statute and the date of the Fund's motion to dismiss under K.S.A. 1996 Supp. 44-566a(c)(3). Here, the Appeals Board finds that respondent did take steps to pursue its claims against the Fund and there is just cause for leaving these cases open.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Dismissal entered by Administrative Law Judge Robert H. Foerschler dated September 17, 1996, should be, and is hereby, reversed and these three docketed claims are remanded to the Administrative Law Judge for further proceedings on the remaining issues concerning the Fund's liability.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

DOROTHY NISPEL

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**DOCKET NOS. 143,397; 143,398
& 143,399**

BOARD MEMBER

c: Christopher T. Wilson, Overland Park, KS
Gary L. Jordan, Ottawa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director